No. 683

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HOME LAND AND CATTLE COMPANY, a Corporation, and THE NATIONAL BANK OF COMMERCE in St. Louis, a National Banking Corporation,

Appellants,

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Copartners under the style and firm name of McNamara & Marlow,

Appellees.

Appellees' Brief in Reply to Additional Brief of Appellants.

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Appellee's Brief in Reply to Additional Brief of Appellants.

The additional brief filed by appellants herein and served on appellees on May 10th, and to reply to which the Court allowed fifteen days, contains several misstatements and misconceptions of the record which should not be allowed to pass unchallenged.

It is not true that the master did not find that the animals, the delivery of which is sought in this action, were peculiarly needful to the appellees, for such need is explicitly found in findings Nos. 17 and 18, Record, page 35.

It is true that the master did not find that such cattle or others like them could not have been procured elsewhere, and hence it was that the request for a re-reference in that regard was made by appellees. (See Record, p. 43, subds. 2d and 3d.)

But this failure was an inadvertence, for the testimony in this behalf was direct, positive, and uncontradicted. Both the witnesses McNamara and Marlow testified that animals such a these, and for which their business arrangements had been made, could not have been procured elsewhere than from appellants at the time this suit was brought, and that the damage consequent on this could not be estimated in money. (See Record, pp. 355, 388, 471, 473, and pp. 395, 412, 414, 415, 475.)

This testimony brings the case directly within the rule announced by the Courts, that specific performance will be decreed where the things bargained for are so related to the situation and business arrangements of the purchaser that nonfulfillment would embarrass or impede him in his plans, threatening or involving a loss of profits which a jury could not correctly estimate. (See Authorities cited on pages 40 to 47 of our original brief.)

It is a total misconception to say that "the master found that the difference between the contract price and the market value of the cattle was five dollars a head."

One of the issues tendered in this case is that the delivery of the cattle contracted for extended over a long period of time, during which time there was liable to be large fluctuations in the value of cattle of the kind contracted for. (See Record, p. 7.)

This allegation is but a statement of a further principle entitling appellees to equitable relief. (See the citation from the 63 Md. 285, quoted on page 45 of our former brief.) The testimony showed this and hence finding 16 of the master. In this finding the master does not say that the difference between the contract and the market price was $5 per head, but that the value of animals of the kind contracted for fluctuated in 1897 and 1898, the value increasing $5 per head in 1897, and $7 in 1898.

In the light of this finding and the uncontradicted testimony (Record, pp. 399, 400) to the effect that the average value of the steers shipped out of this herd was $35.50 per head, it is idle to say that the shortage of beef steers is represented by a difference of $5 per head.

We have shown in our former brief, pages 35 and 36, that appellees paid the Cattle Company $2 per head more than the cattle were worth because of the guaranty contained in clause 9. This, on the basis of 16,000 head actually received (Finding 7, Record, p. 31), is $32,000. Had appellees received the 1865 head shortage they would have realized a profit on them of at least $10.50 per head, or a total of $19,582.50. Consequently, the loss to appellees is upward of $51,582.50, for which, under clause 9 of the contract, they can only receive $37,300. How, then, appellants can claim that under any circumstances the loss to appellees was but $9,300, or that in requiring them to live up to their contract and to perform it as far as they were able their property is "confiscated," is beyond our comprehension.

Nor is it true that in requiring them to live up to the contract, appellants were not given credit for all the property received from them. It is plain from finding 11 that on October 22, 1897, had appellants done what they had agreed to do, they would have been entitled to and would have received from appellees the full sum of $9,675, but by refusing to turn over the 500 head of horses their credit account was reduced by $10,000, so that instead of appellees being indebted to them, they are indebted to appellees. And this being so, the decree, necessarily, could not provide for either a credit or a payment to the defendants.

There is no word in either the findings or the testimony which justifies counsel's remarkable assertion that appellees "are confessedly retaining $38,450 of defendants' money." "As the case now stands," the appellants have received credit for and have been paid every penny they are entitled to, and at the same time they have paid over to appellees what they agreed to pay and which by their present attitude they are seeking to evade. An unwarrantable assertion is made on page 3 of this Additional Brief with regard to the opinion of the lower court. Now, although it is true the master found the solvency of the cattle company, still it must be borne in mind that this concern was not paying its current obligation as they matured. This was frankly admitted by its president, Mr. Niedringhaus. (See Record, p. 92.) This, under the rule announced in the Federal courts and in Mon-

tana, is the test of solvency, i. e., the ability to pay obligations as they mature in the usual course of business.

See Hayden vs. Chemical Nat. Bank, 84 Fed. Rep. 874.

Buchanan vs. Smith, 16 Wall. 277.

Stadler vs. First National Bank, 22 Mont. 217.

It should also be remembered that so far as assets in Montana are concerned neither appellant was in a position to respond to a judgment in favor of appellees.

In this regard the case here comes within the rule announced in Johnson vs. Brooks, 93 N. Y. 344, there the Court said: "Brooks [the defendant] is a nonresident of this State, and even assuming the case to be one [as I do not think it is] of doubtful equity, it could not be expected that any Court would send its suitors to a foreign tribunal when the defendant is within its own jurisdiction with property in hand wherewith to perform his obligation."

As we understand it, a specific performance will be decreed not only when the circumstances such as these suggested in the cases quoted in our former brief on pages 38 to 47 exist, but whenever the plaintiff is liable to meet with unusual difficulties in obtaining relief because of a breach of the contract, this rule being stated by the United States Supreme Court as follows:

"The enforcement of contracts not relating to realty by a decree for specific performance is not an unusual exercise of equity jurisdiction. Such cases are numerous both in English and American jurisprudence. They pro-

ceed upon the ground that under the circumstances a judgment at law would not meet the demands of justice; that it would be less beneficial than relief in equity; that the damages would not be an accurate satisfaction; that their extent could not be exactly shown, or that the pursuit of the legal remedy would be attended otherwise with doubt and difficulty.

"Judge Story, after an elaborate examination of the subject, thus lays down the general rule:

" 'The just conclusion in all such cases would seem to be that courts of equity ought not to decline the jurisdiction for a specific performance of contracts whenever the remedy at law is doubtful in its nature, extent, operation, or adequacy.' 2 Story Eq. Jur., sec. 728; see, also, Stuyvesant vs. Mayor of N. Y., 11 Paige, 414; Barr v. Lapsley, 1 Wheat. 151; Storer v. Ry. Co., 2 You. & C. (N, R.) 48; Wilson vs. Furness R. R. Co., L. R. 9 Eq., 28"; Express Co. vs. Railroad Company, 99 U. S. 200.

This is what Judge Knowles evidently had in mind when he said: "I think it may be treated as if insolvent in Montana. It had not the means wherewith to liquidate complainants' claims on account of the deficiency of the cattle above mentioned, if complainants paid to the defendant bank the amount due for the last delivery of cattle made to them; the cattle gathered by the defendant, the Home Land and Cattle Company, in the year 1898 were upon the range and scattered, and it would seem unjust to require a creditor to hunt them up in order to render them subject to his demand."

Not only would such a course have been difficult, but as the testimony shows, it would have been impossible to have the animals rounded up after October 22d. And again, if it could have been done, such remaining animals would not have sufficed to pay appellees' claim because of the shortage. They were worth only $15,256 (Finding 15, Record, p. 34), whereas, as we have seen, the shortage account was $37,900. To have paid for the animals delivered on October 21st and 22d and then sought relief for the Cattle Company's failure to keep its guaranty good would have necessarily entailed the cost and labor of a round-up, not in 1897, when it had become impossible, but in 1898. By such round-up only a partial satisfaction would have been realized, and further, an additional litigation in a State foreign to the one where the contract in question was to be performed would have become necessary. This, we apprehend, in the language of Johnson vs. Brooks, supra, no Court would exact of its suitors when the defendant was in its jurisdiction with property in hand wherewith to perform its obligation.

Again, in this additional brief, on page 7, the misstatement is made that on October 22d, 1897, the "appellees had collected for 148 head of strays, which at $25 is $3,700."

The record, as we have previously shown, contains nothing to justify this statement. On October 22d appellees had received reports from the Board of Stock Commissioners of 113 strays only. (See Finding 11, and testimony of Marlow, Record, pp. 341, 362.) During the year 1897 a total of 148 strays had been reported. (See

finding 8 and testimony of Marlow, Record, p. 362.) And as to the payment for these strays, Marlow testifies (Record, p. 361): "No payments were made on strays until the end of the season. I allowed for these strays on the 22d of October, all that we had returns for at that time." The date when the proceeds from the strays were received is definitely fixed as November 30th, 1897. (See Exhibit "G," Record, p. 611.) It follows, therefore, that in tendering the contract price of $25 per head on October 22d, appellees were giving appellants credit for all that was then due them. Some stress seems to be placed upon the form of the decree in this case, but inasmuch as no such point is covered by the assignment of errors herein, it is not now available. But aside from this the decree is the usual one in an action of this nature.

We think no further consideration need be given to this "additional brief." We contend that the master's findings are supported by the evidence; and that in the absence of a special finding in any particular, the presumption is that every fact necessary to sustain the decree was fully established, and the burden is upon appellants to show the contrary, every intendment being in favor of the decree.

That it appears from the evidence and findings in the case and the necessary inferences therefrom that the delivery of October 21st and 22d, and of which notice was given in writing, was intended to be and was the last delivery and the end of the round-up season of 1897, was then fixed and determined.

That appellant company was indebted at this time to the bank, to which it had assigned the moneys due under the contract in an amount nearly sufficient to absorb the entire proceeds of the sale and leaving no balance with which to liquidate the shortage due under clause 9 of the contract. That the appellants well knew the amount of this shortage and that if it were liquidated when due, viz., on the last delivery at the end of the round-up season, fixed by themselves at October 21st and 22d, there would not be sufficient money to satisfy the bank. Thereupon, with manifest bad faith, appellants, in the midst of the delivery, demanded payment for the cattle as delivered, without regard to the amount due for shortage, and broke off the delivery in the midst thereof.

That their intent was to secure payment in full and compel appellees to sue in a foreign jurisdiction for the shortage money is manifest, as is also their determination to plead in defense of any suit the alleged illegality of clause 9, upon the ground that said clause as they claim provided for a penalty. They sought to secure every advantage under said contract and to repudiate their just and reciprocal obligations thereunder. In the face of their announced intention to make the final delivery of the season on October 21st and 22d, they seek to evade the consequences of their positive declaration. While owing the entire amount found due for the shortage, they assert their right to be paid in full for the cattle as delivered, without regard to said shortage, and

impudently refer appellees to the Courts of Missouri, if they seek redress on that score. Under such conditions, the conduct of appellants was lacking in good faith and their unconscionable intentions too thinly disguised to warrant appellees in doing other than they did, when they insisted, as was clearly their legal right, that the mutual accounts should be then and there adjusted and settled.

The attempt to compel appellees to pay in cash and collect in a foreign jurisdiction at the end of a litigation, in which repudiation of clause 9 was to be the defense, does not appeal to the conscience of a Court of equity, and did not favorably impress the master to whom the case was referred nor the Court below, by whom the master's findings were approved.

The appellees had no other plain or adequate remedy than the one sought in this suit, and a Court of equity was fully justified in granting them the specific relief, against such manifest bad faith as has been exhibited by appellants throughout this transaction.

And, in conclusion, we submit: 1st. That appellees were clearly within their legal rights in requesting an adjustment of the mutual account existing between them and appellants on October 22d, 1897; 2d. That appellants, under the facts and circumstances disclosed by this record, were not justified in stopping the delivery due from

them on October 22d; 3d. That the conclusions of the master and the trial court were correct; 4th. That the decree is correct and should be affirmed.

All which is respectfully submitted.

May 14th, 1901.

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